ment of the Mineral Leasing Act (Supp. Brief 81). They were the subject of a contest proceeding, Contest No. 12029, initiated by the Department of Interior against the claimants in 1929. The claims were declared invalid in 1930 for failure to perform annual assessment work. (A. 343) On September 8, 1959, respondents filed application for mineral patent (Colo. 03079). This application was rejected by the Manager of the Colorado Land Office, Bureau of Land Management, and the decision was affirmed by the Solicitor of the Department on April 17, 1964, in *Union Oil Company of California*, 71 I.D. 169. (A. 352, 375)

On July 31, 1964, respondents filed an action in the United States District Court for the District of Colorado seeking a declaration that the decision of the Solicitor was void and seeking a mandatory injunction compelling the Department to take such action as is necessary to issue the patents. (A. 342, 351)

The District Court declared the decision of the Solicitor to be void. *Oil Shale Corporation v. Udall*, Colo., 261 F. Supp. 954. The Tenth Circuit affirmed, *Udall v. Oil Shale Corporation*, 406 F. 2d 759.

ARGUMENT

A. THE SECRETARY LACKED JURISDICTION TO DECLARE CLAIMS INVALID FOR FAILURE TO PERFORM ASSESSMENT WORK.

The question in this case is whether the Secretary of Interior had authority to void a mining claim for failure of the mineral locator to perform annual assessment work. If such authority did not exist, the action taken by the Secretary in 1930 was void, and the decision below was correct.

In 1930, this Court held that the Secretary could not cancel a claim for failure to perform annual assessment work. *Wibur v. Krushnic*, 280 U.S. 306. In 1919 Krushnic located some oil shale claims in Garfield County, Colorado.

In 1922, he applied for a patent on the claims. The Commissioner of the General Land Office in a proceeding against the entry held the claim void upon the sole ground of insufficient assessment labor for the year 1920. The Court set forth the established law on the rights of persons who had stacked a mineral claim, Page 316:

> "The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that, when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is 'real property,' subject to the lien of a judgment recovered against the owner in a state or territorial court.*** The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, the possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not ipso facto forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation."

The government ignored the *Krushnic* decision and continued to cancel hundreds of oil shale claims in Colorado, solely on the ground that annual assessment work was not done. For this reason this Court again had to rule on the power of the Secretary to cancel on that ground. *Ickes v. Virginia-Colorado Development Corp.*, 295 U.S. 639. In reviewing the extent of the authority of the Secretary, it was said, page 645:

> "There was authority in the Secretary of the In-

terior, by appropriate proceedings, to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment.***"

However, on the question of the power of the Secretary to invalidate a claim for failure to do annual assessment work, the Court said, page 647: [Emphasis supplied]

> *"We think that the Department's challenge, its adverse proceedings, and the decision set forth in the bill went beyond the authority conferred by law."*

This Court clearly held that the Secretary was without authority to cancel the oil shale claims on the ground of failure to perform annual assessment work. If he was without such authority, then the cancellations in 1930 by the Secretary of the subject claims was of no effect, and the 1964 rejection of the patent application was improper.

The Secretary finally acceded to the Supreme Court and implemented the law set forth in *Virginia-Colorado*. In *The Oil Shale Company*, 55 I.D. 287 (1935), the Commissioner had denied a patent application for failure of assessment work. The First Assistant Secretary reversed the decision and remanded the case with instructions to reinstate the application and to dispose of it unaffected by default in the performance of assessment labor. The Assistant Secretary said that "the challenge to the valid existence of the claims had no proper basis; and that the Department's challenge, its adverse proceedings and the decision set forth in the Bill went beyond the authority conferred by law." He concluded that: "The above-mentioned decisions in the cases of *Francis D. Weaver and Federal Oil Shale Company and other department decisions in conflict with this decision are hereby overruled.*" [Emphasis supplied]

One of the conflicting decisions overruled was, therefore, the 1930 cancellation of the claims owned by these respondents; and there can be no proper claim of res judicata.

Thereafter, the Department of Interior followed the law in *Virginia-Colorado*. Thus, in a letter dated June 28, 1935, Commissioner Fred W. Johnson said: (A. 43)

> "It is possible if you left your claims in 1925 and have not since performed assessment work thereon that they have been relocated, but as also stated in the paragraph referred to, 'The determination of the question of the right of possession between rival or adverse claimants to the same mineral land is committed exclusively to the court.' Matters of trespass, thievery, etc., such as those referred to in your letter, are also committed to the jurisdiction of the court, being punishable only under the laws of the state. As this office has no jurisdiction in the matters mentioned in your letter it will not undertake to advise you in that regard."

Commissioner Johnson said on July 25, 1935: (A. 44) "Replying to your letter of July 20, 1935, you are advised that *this office has no jurisdiction over questions relating to the performance of annual assessment work on mining claims*, such questions being committed exclusively to the court. "[Emphasis supplied]

Secretary Chapman on February 11, 1946, said in a letter: (A. 44) "The failure to perform the annual assessment work for the benefit of a valid mining location has no effect as against the United States but only renders the claims subject to loss through relocation by another claimant if the work is not commenced or resumed before such relocation. Therefore, *the question of whether the work done is of a nature that would be considered assessment work is not one within the jurisdiction of this Department.*" [Emphasis supplied]

It was not until the decision in *Union Oil* in 1964, that the Department reversed itself and asserted that a mining claim could be voided for lack of assessment work. Clearly, the action of the Department in rejecting the patent appli-

cations on the basis of the 1930 cancellation was wrong. The Department did not have subject matter jurisdiction to cancel the claims. If it did have such jurisdiction, then the cancellation was overruled in *The Shale Oil Company*, 55 I.D. 287.

The decision below is correct.

B. VIRGINIA-COLORADO SHOULD NOT BE OVERRULED.

The government contends that this Court should overrule *Krushnic* and *Virginia-Colorado*. It is said that under the law existing prior to the date of those decisions, the government *did* have the right to forfeit claims for failure of annual assessment work. This is incorrect and the Department itself was aware of the state of the law. Secretary Lane in a letter dated October 23, 1918, stated: (A. 43)

> "I am in receipt of your letter dated October 2, 1918, and making inquiry as to the necessity for performing annual assessment work on some oil shale lands in Wyoming, which you and associates are claiming under placer mining locations made in 1917 and 1918.
>
> ***
>
> "As a general rule matters involving questions of assessment work on mining claims arise between adverse claimants to the same mineral land and go only to the right of possession, the determination of which is committed exclusively to the courts."

First Assistant Secretary Vogelsang wrote on January 20, 1919: (A 43)

> "The annual expenditure on unpatented mining location required under Section 2324 U.S. Revised Statutes, and commonly called annual assessment work, is, with the exception of certain phosphate locations affected by a special act of Congress, solely a matter between rival and adverse claimants to the same

mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. In other words, the non-performance of assessment work renders the land subject to adverse relocation provided work is not resumed. (40 Stat. 343)."

Clearly the law has always been that annual assessment work is not a necessary element of a valid mining claim. If a claim is otherwise perfected, the locator has a property right, which right does not terminate upon failure to perform assessment work. The only defeasance of the right could come from another locator. In *Belk v. Meagher*, 104 U.S. 279, the rule is clearly announced that mere failure to do assessment work does not terminate the locator's right of possession, until there has been an interruption by the intervention of a relocator. See also *Forbes v. Gracey*, 94 U.S. 762; *Bingham Amalgamated Copper Co. v. Ute Copper Co.*, 181 F. 748; *North Noonday Mining Co. v. Orient Mining Co.*, 1 Fed. 522. As said in *Krushnic*, a mining claim is property in the fullest sense of the term.

Nor did the Mineral Leasing Act of 1920 change the state of the law, as held in *Krushnic* and *Virginia-Colorado*. That Act did not grant to the Department the right to cancel claims for failure to perform assessment work. The government's "newly discovered" legislative materials are not persuasive that this Court misconstrued the Act. It would seem that the Supreme Court in 1930 was in a good position to determine what Congress intended in 1920. The passage of time to 1970 cannot have changed that intent.

The government in its brief and supplemental brief refers to the claimants and their predecessors as speculators. A contrary view was expressed by a member of Secretary Udall's Oil Shale Advisory Board and former Regional Administrator of the Bureau of Land Management for Colorado and Utah. H. Byron Mock states in 43 Denver Law Journal 51: "Probably most impressive to me was the large number of dedicated mining men who had

sunk every available dollar into development and retaining and patenting oil shale claims. Even then sons of those original pioneers were succeeding to the struggle as the original pioneers began to die off. Today only a few of those original dedicated working dreamers still survive. Neither they nor we public officials of those days knew or suspected that their claims were then null and void for procedural reasons and that the revelation would be forthcoming in 1964, notwithstanding the even then 'long established administrative practices.' "

The government must bear a major part of any blame for slow development of shale oil. Immediately after the passage of the 1920 Mineral Leasing Act, the Department began its campaign of cancellation of the claims for lack of assessment, and it was not until 1935 that it finally quit. Certainly, this prevented any development on most unpatented claims. There was, of course, renewed interest in shale oil after World War II. But here again, the government impeded development by another attempt to cancel claims on assessment grounds. Respondents here applied for a patent in 1959, and as yet have not had a hearing on their application. We don't suggest that whether there is a booming oil shale industry has anything to do with the merits of this action. To the contrary, the government's comments on this appear to be irrelevant.

It is suggested by the government that administration of the "Public" lands would be made easier if its wholesale cancellations of claims were allowed to stand by this Court. No doubt it would be easier. But that is hardly any justification for an illegal forfeiture of property rights.

It may be, as the government says, that the Virginia-Colorado decision has presented problems to the Department in the performance of its duties. But neither problems nor the passage of time are any justification for overruling of that decision. The solution to problems must come from Congress, not the Judiciary.

CONCLUSION

The judgment should be affirmed.

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